

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

JULY 31, 2003  
MORNING PAPER  
(9:00 A.M. TO 12:00 NOON)  
QUESTIONS

ESSAY SECTION

1. Inform, Inc. ("Inform") was an electronic consulting firm founded and owned by Dimon. It had 300 employees and was the principal employer in Town. Dimon had hired Pat as Inform's chief executive officer with a three year employment contract that contained a provision for the payment to Pat of \$1 million per month for ten months as severance pay if his employment was terminated within the three years. Dimon personally guaranteed the severance pay. After two years, Dimon dissolved Inform, paid off the creditors and terminated all employees without severance, except Pat, to whom he paid \$1 million for the first month of severance pay.

Pat lived in a modest home in Town, was not involved in any social or political activities and had no friends or acquaintances except two subordinates in Inform. Upon receipt of the \$1 million from Dimon, he flew to Monte Carlo where he lost all the money gambling, except for \$5,000 which he had given to his son Harry to "have a good time".

Harry was a student at a school in a nearby town. He used the \$5,000 to rent a suite in a hotel which was occupied by him and his girlfriend, Pamela, for three days. On the last day, he and Pamela threw a drugs and alcohol party for many of Harry's classmates. Neither Pamela's parents nor friends knew about her relationship with Harry or the party.

Dimon wanted to avoid having to pay the remaining \$9 million of severance pay to Pat. He hired a private investigator who learned about Pat's gambling losses and Harry's party. He

demanded that Pat agree to cancel the remaining payments. Pat refused. Dimon decided that his best chance of avoiding the remaining payments would be to embarrass Pat by making public his use of the \$1 million. Dimon then told the editor of Town Crier, the local newspaper, the facts about Pat's severance pay payment of \$1 million and its use by Pat, Harry and Pamela. The editor had a reporter investigate the facts given to him by Dimon. Town Crier then published the whole story.

Pat, Harry and Pamela sued Dimon and the owner of Town Crier. At their depositions, each of the plaintiffs admitted the validity of the story.

What are the rights of the parties?

2. Owner employed Slick as a janitor at Owner's office building. Heavily in debt and in need of money, Slick changed the amount of his paycheck, which had been drawn on Owner's account at First Bank, from \$400 to \$4,000 and endorsed it to Lender, who accepted it in payment of a \$4,000 debt Slick owed to him. Lender thereafter cashed the check at First Bank, which charged Owner's account for \$4,000.

Next, Slick took from Owner's desk a rent check payable to Owner, which had been drawn by Tenant who leased an office from Owner, on Tenant's account at Second Bank. Slick endorsed the check in Owner's name and cashed it at First Bank, where Owner maintained an account. First Bank, in turn, presented the check for collection at Second Bank, which paid First Bank and charged Tenant's account.

Slick then used his pass-key to enter Tenant's office after hours where he stole a blank check on Tenant's account at Second Bank. He signed Tenant's name to the check, which he made payable to Car Dealer for \$10,000, and gave it to Car Dealer to pay for a car he bought from her. Car Dealer then cashed the check at Second Bank, which charged Tenant's account.

Slick has disappeared.

What are the rights of the parties?

3. Manufacturer owned a fast-growing manufacturing business. Realizing that he would need a bigger plant to meet the demands of his customers, Manufacturer put his plant on the market and began to search for land to construct a new one. He was approached by Sly, who offered to purchase the plant for conversion into condominiums. On April 1, Manufacturer and Sly signed a contract by which Manufacturer agreed to sell the plant to Sly, with the sale set for June 1. Under the contract, Sly paid a large deposit to Manufacturer. Sly's obligation to purchase was contingent upon his obtaining, by May 31, all necessary governmental permits and approvals for the condominium conversion. Otherwise, the contract was to terminate and Sly's deposit was to be refunded. Sly never revealed to Manufacturer that he was acting as an agent for Speculator, a real estate developer.

On May 1, Manufacturer offered to buy Homer's house, which was well situated for Manufacturer's new plant. Manufacturer gave Homer a cash deposit, telling him that a written contract was unnecessary since he would close the sale by June 1. Homer quickly bought a new house for himself and moved into it.

Manufacturer then contracted with Builder to construct a new plant consisting of modular units on Homer's property. The contract required Builder (1) to take on no other projects until the plant was built; (2) to purchase the modular units immediately; and (3) to start construction no later than June 15.

On May 31, Sly told Manufacturer that he had not obtained the permits and approvals for the condominium conversion and that their contract was terminated. During their conversation, Sly let slip that he had been negotiating for Speculator. Manufacturer later discovered that Speculator had purchased another property for a condominium project and that

neither he nor Sly had even applied for the permits and approvals needed for Manufacturer's property. He refused to refund Sly's deposit.

Without the sale of his existing plant, Manufacturer was unable to proceed with his plans. He advised Homer that he could not purchase his property and requested the return of his deposit. Manufacturer also notified Builder that their contract was off. Builder, who had already purchased the modular units and had turned away other projects, was in danger of losing his business if Manufacturer did not honor the contract. Manufacturer offered him a small cash settlement that was only enough for Builder to meet his current payroll and overhead. Builder, who was desperate, accepted the settlement and signed a full and final release of all liability, prepared by Manufacturer's attorney.

What are the rights of the parties?

4. In 1988, Mary and John, a married couple, bought a two-acre parcel of property (“Property”) in Anytown, MA. On the advice of their lawyer, Mary and John decided to take title to the Property in nominee trust form. Accordingly, they executed the Em-Jay Realty Trust (“Trust”) with their adult son, Paul, as trustee and Mary and John themselves as sole beneficiaries. Title to the Property was taken in the Trust’s name.

Among other things, the Trust provided that “the trustee shall have no power to deal in or with the Property except as directed by Mary and John.”

In 1990, Mary and John executed a notarized amendment to the Trust which (1) added their adult daughter, Susan, as a co-trustee; and (2) added a provision that “upon the death of Mary and John, the Trustees shall transfer and convey the Property to themselves as tenants in common.”

By 1998, Paul had so displeased Mary and John because of his inattention to their directions for the management of the Property that they amended the Trust again. The notarized amendment (1) removed Paul as a trustee, leaving Susan as sole trustee; and (2) provided that, “upon the death of Mary and John, the trustee shall transfer and convey the Property to herself and no other.”

John died in February, 2002. Mary died a week later.

Paul is the residuary legatee under Mary’s and John’s wills. He has claimed that the Property belonged to the estates, which have no other assets. Susan, as trustee, has conveyed the property to herself and her husband. A nurse, Anna, who cared for Mary and John in their last illnesses, has sued both estates for services rendered and has attempted to attach the Property.

What are the rights of the parties?

5. In 1990, Wendy, a trial lawyer representing plaintiffs in contingency fee cases, married Hal who owned a small start-up company specializing in software production. A son, Stan, was born to them in 1996, with severe brain damage.

Between 1996 and 1999, Hal ran his business from the home that he and Wendy had purchased with the help of Wendy's father who gave them a gift of the down-payment. Hal also provided most of Stan's day-to-day care. In 1999, Hal sold his business to Megacorp Inc. which paid him \$1,000,000 in cash and 10,000 stock options in Megacorp, then trading at \$100 per share. Hal became a vice-president of Megacorp, under a written employment agreement, and received an annual salary. He also became a member of Megacorp's pension and stock purchase plans. Hal invested the \$1,000,000 in a mutual fund in his own name. None of his stock rights under his purchase-and-sale and employment agreements were to vest until 2004. At present, the stock has been trading in a range of \$5 to \$6 per share, and Hal believes he may lose his job.

By 1999, Wendy's practice had grown. Her income came wholly from the contingency fee work and it varied substantially from year to year. During Hal's negotiations for the sale to Megacorp, and after he went to work for Megacorp, Wendy kept up her practice and spent considerable time caring for Stan. Hal also was the plaintiff (as Stan's parent and next friend) in a medical malpractice suit against the doctor who delivered Stan, in which he sought damages on Stan's behalf, and for himself for loss of Stan's companionship.

During the marriage, Wendy and Hal pooled their incomes in a joint checking account, from which they paid taxes, mortgage payments and all their living expenses.

In 2000, Wendy and Hal agreed to a divorce on the ground of irretrievable breakdown of the marriage. They agreed on everything except on how to divide the marital estate. At trial in the Probate and Family Court, Wendy and Hal testified to the above facts.

Please prepare a memorandum for the judge (a) identifying the assets subject to division between Wendy and Hal; and (b) setting forth the considerations guiding division of the assets.



MASSACHUSETTS BAR EXAMINATION

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JULY 31, 2003  
AFTERNOON PAPER  
(2:00 P.M. TO 5:00 P.M.)  
QUESTIONS

ESSAY SECTION

6. Dana orally listed his house with Broker at a price of \$50,000. He gave no authority to Broker other than to produce a qualified purchaser. On the Friday following the listing, Paul saw the property, liked it and telephoned Broker that he would pay the asking price. He told Broker that he would sell his own house the very next day to an old friend who had wanted it for years and that therefore he would be ready to move into the Dana house as soon as papers were passed. Broker requested a \$5,000 deposit check. Paul said he would mail it on the following Monday, when he would be in his own office. Broker called Dana and repeated Paul's entire conversation with him. Dana said, "it's a deal". Broker then called Paul and repeated what Dana had said to him. In reliance on that call, on Saturday, Paul signed an agreement to sell his home to his old friend.

On the following Tuesday, Broker received Paul's check and called Dana who then said he had decided to sell to another person who was offering him \$55,000. Broker then returned Paul's check with a letter which stated: "Even though my customer, Dana, had agreed to sell to you, he now has a better offer and I have no choice but to return your check."

What are the rights of the parties?

7. College, an all women's liberal arts college, was established under the will of an heiress of a well-known Boston family. The terms of the will stated that: "Because of the lack of opportunity for women to receive a college education, I leave my entire estate for the founding of a college of higher learning solely dedicated to the education of women." College found it difficult to compete with other institutions and began applying for, and receiving federal and state aid. By the 1990's, about 25% of College's operating budget came from federal and state grants. Also, about 46% of College's students received federal or state financial aid or relied on guaranteed federal loans.

Charles, an eighteen year old male, applied to College but received a letter stating that College only accepted applications from women. Charles ranked in the top 5% of his class, had high SAT scores and had many extracurricular activities, including being captain of the track team.

According to the admission criteria published by College, Charles' grades, class rank, SAT scores and extracurricular activities would make him a "serious" candidate for admission to College.

Charles has brought a lawsuit in federal court to force College to accept him. Charles has filed a motion for summary judgment. Both parties agree that the facts are undisputed.

How should the court rule?

8. Frank, a resident of Boston, attended a conference at Resort in a western state. On October 14, 2000, Frank was injured when he slipped and fell while getting out of Resort's hot tub.

Resort was a corporation wholly owned and operated by Hospitality, Inc. ("Hospitality"), a Delaware corporation with its principal place of business in the western state. Hospitality was not registered to do business in Massachusetts and did not own or operate any business in Massachusetts. Resort had a website on the internet linked to Hospitality's website, which described Resort's amenities, rates and services. Reservations at Resort could be made over the internet and, in fact, Frank's accommodations at Resort were made and paid for by his employer, located in New York, through Resort's website on the internet.

On January 10, 2003, Frank sued Hospitality and Resort in the Suffolk Superior Court. In the complaint, Frank alleged that his injuries were caused by the negligence of Resort's agents, employees and servants in maintaining and servicing the hot tub and he claimed damages of \$150,000 for his injuries, lost wages and permanent disability.

On May 16, 2003, Frank's attorney mailed a copy of the complaint to Hospitality at its home office and to the General Manager of Resort at its address.

What procedural steps may the defendants take in this action?

9. Dale, a lawyer, was approached by Ace, a real estate developer, who asked Dale's assistance in preparing closing documents for residential housing. The plan involved the purchase and resale of run-down properties using straw buyers, fraudulent appraisals and false loan documents. Dale reluctantly agreed, but only after Ace promised that "nobody will get hurt. We're just taking a little off the top." Dale continued, on occasion, to perform similar services for Ace. Frequently, Dale's secretary, Sal, at Dale's instruction, would certify the false appraisals and amend the financial statements to conform with Ace's requirements. Paula, Dale's law partner, was curious about the sudden surge in Dale's real estate practice. Paula asked no questions, even after she saw Sal copying whited out loan documents and marking them as "Originals." About a year after Dale received his first check from Ace, Dale learned that Ace's scheme was being investigated by a federal Grand Jury.

Dale regularly saw Head, a psychiatrist, for counseling. Head received a federal Grand Jury subpoena to testify about conversations with Dale. The subpoena was supported by Officer's Affidavit alleging that Dale had used Head for assistance in hiding Ace's payments to Dale. Head refused to testify, claiming his conversations with Dale were "private." Paula, upon hearing about the Grand Jury investigation, immediately hired Accountant to provide advice about the firm's finances and then hired counsel. Accountant was also subpoenaed by the Grand Jury and refused to testify, saying that the work she had performed was done at Paula's counsel's request. Although Sal initially claimed to know nothing about Ace's scheme, she eventually acknowledged that she believed what she was doing was "not right" but was afraid to object for fear of being fired.

1. How should the Court rule on a motion to compel Head's testimony?
2. How should the Court rule on a motion to compel Accountant's testimony?
3. What defenses, if any, are available if Sal should be charged with a crime?
4. With what ethical violations, if any, can Paula be charged?

10. Sandy worked for Company in a building with sealed windows owned by Landlord. After several weeks of overtime work in the building, Sandy developed a headache, fever and nasal swelling and was out ill. After returning to work, Sandy's symptoms worsened. Sandy visited Doctor, a physician certified in environmental medicine (although this specialty is not recognized by the American Board of Medical Specialties) who diagnosed Sandy as having severe chemical sensitivity caused by poor air quality in the building where he worked. When several of Sandy's fellow employees experienced the same symptoms, all sought treatment from Doctor who diagnosed chemical sensitivity in each of them and suggested that they not work in the building. Company then decided to relocate its offices, citing "sick building syndrome" and Landlord sued for the remaining rent.

During the course of discovery, Landlord's lawyers reviewed nearly 200,000 documents and produced nearly 70,000 of them to Company's lawyers. The documents were sent to an outside copying service which copied and returned them to Landlord's lawyers. Although privileged documents had been placed in separate boxes in the mail room, Associate mistakenly gave the copying service a box of the privileged documents which were copied and ultimately given to Company's lawyers with the rest of the production. Although Associate realized that about 200 privileged documents had been copied, he was too afraid to report his mistake. Company's lawyers informed Landlord's lawyers of the error about a week after having received the mistaken production. Company's lawyers refused a request to return the documents, claiming the privilege had been waived when the documents were produced. At the hearing on Landlord's motion to compel return of the documents, Associate was present and heard testimony from Landlord's lawyers that the documents had been segregated and that no one had been aware the privileged documents had been copied until told by Company's lawyers.

Associate said nothing. At trial, Landlord's expert testified that there was no such thing as "sick building syndrome." Doctor testified that, based solely on his observations and clinical experience, Company's employees suffered from chemical sensitivity caused by sick building syndrome. Landlord moved to strike Doctor's testimony, claiming that it lacked reliability, both in its conclusions and the underlying methodology.

1. How should the court rule on Landlord's motion to compel return of the privileged documents?
2. How should the court rule on Landlord's motion to strike Doctor's testimony?

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